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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Mad Dog Multimedia, Inc.

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Serial No. 78407114

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AnneMarie Kaiser of Knobbe, Martens, Olson & Bear, LLP for Mad Dog Multimedia, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

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Before Seeherman, Hairston and Grendel, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark MEGASTOR in standard character (typed) form for goods identified in the application, as amended, as "computer components and peripherals, namely, internal DVD-RW drives and external DVD-RW drives."[1]

[1] Serial No. 78407114, filed April 23, 2004. The application is based on applicant's asserted bona fide intent to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that, as applied to applicant's goods, the mark so resembles the mark MEGASTORAGE, previously registered on the Principal Register in standard character form for "audio and video disc players, and audio and video disc changers,"[2] as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d). We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

[2] Registration No. 2159379, issued May 19, 1998. Affidavits under Sections 8 and 15 accepted and acknowledged. The registration is owned by Sony Kabushiki Kaisha TA Sony Corporation.

Under the first *du Pont* factor, we must determine whether applicant's mark, MEGASTOR, and the cited registered mark, MEGASTORAGE, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc., supra.* The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In terms of appearance, we find that MEGASTOR and MEGASTORAGE, both of which are depicted in standard character form in the application and cited registration, respectively, are identical but for the last three letters in the cited registered mark, "AGE." The marks consist of or include the same first eight letters, i.e., MEGASTOR. That basic point of similarity in the marks' appearances is of greater significance than the sole point of

dissimilarity between the marks, i.e., the additional letters "AGE" in the cited registered mark.

In terms of sound, we find that the marks are identical but for the last syllable of the cited registered mark, "AGE." Applicant's mark MEGASTOR sounds the same as the first two syllables of the cited registered mark, a point of similarity between the marks which is of greater significance than the sole point of dissimilarity between the marks, i.e., the additional syllable "AGE" at the end of the cited registered mark.

In terms of connotation, we find as follows. The "MEGA" component with which each of the marks starts means the same thing in each mark, i.e., "large," "surpassing other examples of its kind; extraordinary."[3] We are not persuaded that this term is merely descriptive, as argued by applicant. At most, it is suggestive of the goods at issue.

Next, the evidence of record includes the following dictionary definitions of "storage" and "store":[4]

[3] This definition from The American Heritage® Dictionary of the English Language (4th ed. 2000) is of record.

[4] Both definitions are from The American Heritage® Dictionary of the English Language (4th ed. 2000).

"**storage**":

Abbr. **stge**., **stor**.
1. a. The act of storing goods or the state of being stored. **b**. A space for storing goods. **c**. The price charged for keeping goods stored. **2**. The charging or regenerating of a storage battery. **3**. *Computer Science*. The part of a computer that stores information for subsequent use or retrieval.

"**store**":

NOUN: **1**. A place where merchandise is offered for sale; a shop. **2**. A stock or supply reserved for future use: a squirrel's store of acorns. **3**. stores. Supplies, especially of food, clothing, or arms. **4**. A place where commodities are kept; a warehouse or storehouse. **5**. A great quantity or number; an abundance.

TRANSITIVE VERB: **1**. To reserve or put away for future use. **2**. To fill, supply, or stock. **3**. To deposit or receive in a storehouse or warehouse for safekeeping. 4. *Computer Science*. To copy (data) into memory or onto a storage device, such as a hard disk.

Based on this dictionary evidence, we find, first, that because "stor." is specifically identified as an abbreviation for "storage," to that extent the "STOR" component of applicant's mark and the "STORAGE" component of the cited registered mark are similar in meaning.. However, we also find persuasive applicant's contention that "STOR" in its mark could be perceived by purchasers as a misspelling of the word "store," and that as applied to

applicant's goods, "STOR" would have the "computer science" transitive verb meaning quoted above, i.e., "to copy (data) into memory or onto a storage device, such as a hard disk." "STORAGE," as it appears in the cited registered mark and as applied to the registrant's goods, would have the connotation of "the act of storing goods or the state of being stored," or "a space for storing goods." The "goods" being stored in this context would be compact discs (CDs) or digital video discs (DVDs), as well as the data contained on such discs.

We agree with applicant's contention that, as applied to the respective goods, the respective marks have slightly different specific connotations. MEGASTORAGE as applied to registrant's goods connotes "providing an extraordinary space for storing goods, i.e., discs and digital data," and MEGASTOR as applied to applicant's goods connotes "an extraordinary ability to copy data into memory or onto a storage device." However, despite this difference in the specific connotations of the marks, we find that the marks share a more basic similarity in connotation at the core; they both connote "extraordinary ability to store." This basic and underlying similarity in connotation is more significant, in our comparison of the marks, than any difference in the more specific connotations of the marks.

Turning finally to a comparison of the marks in terms of overall commercial impression, we reject applicant's argument that the marks present different commercial impressions because both applicant and registrant always use their house marks in conjunction with the marks at issue. Our comparison of the marks must be based on the marks as they appear in the drawings of the application and registration, respectively, neither of which includes a house mark. *See Frances Denney v. Elizabeth Arden Sales Corp.,* 263 F.2d 347, 120 USPQ 480 (CCPA 1959); *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992); *Blue Cross and Blue Shield Association v. Harvard Community Health Plan Inc.,* 17 USPQ2d 1075 (TTAB 1990). When we make that comparison, we find that applicant's mark and the cited registered mark are similar rather than dissimilar in terms of overall commercial impression. Each of the marks comprises a composite consisting of the designation MEGA joined to a form of the word STORE. This basic similarity outweighs any specific points of dissimilarity between the marks.

Comparing the marks in their entireties as to appearance, sound, connotation and overall commercial impression, we conclude that the marks are similar rather

than dissimilar. The first *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

We turn next to the second *du Pont* factor, which requires us to consider the similarity or dissimilarity between the goods identified in the application and in the cited registration. It is settled that it is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. That is, the issue is not whether consumers would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. It is sufficient that the goods be related in some manner, or that the circumstances surrounding their use be such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. *See In re Martin's Famous Pastry Shoppe, Inc*., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp*., 18 USPQ2d 1386 (TTAB 1991); and *In re International Telephone & Telegraph Corp*., 197 USPQ 910 (TTAB 1978).

The record includes dictionary definitions of the words "player" and "changer" appearing in the cited registration's identification of goods.[5] "Player" is defined as "a machine that reproduces recorded audio or audiovisual material." "Changer" is defined as "a device that causes each of a series of audio or audiovisual recordings to be played automatically: *a record changer; a compact disk changer*."

Applicant has submitted a printout from its website, which includes the following pertinent text describing the features of applicant's goods:

> The MegaSTOR 6-in-1 supports the newest DVD+R standard (DVD+R DL) thus allowing you to store up to 80% more data on one disc. If you are an audio enthusiast, office professional or movie fanatic, the MegaSTOR 6-in-1 is YOUR versatile entertainment and largest capacity storage solution. Because MegaSTOR is a Dual Format burner and is backward compatible to support single layer media, you will have the flexibility to write or rewrite on ANY CD-R, CD-RW, DVD±R or DVD±RW media. All of these features in one great product combined with our industry leading 2 Year Warranty enforce Mad

[5] Both definitions are from The American Heritage® Dictionary of the English Language (4th ed. 2000). We take judicial notice of these definitions, submitted by applicant with its brief.

> Dog Multimedia's commitment to Uncompromising Excellence.
>
> ...
>
> **Features**
>
> **● 16X DVD±R Writer**
> Simplify! Convert your old VCR tapes to a manageable number of DVD discs that will last for generations. Create digital photo albums that will last forever! Supports all popular formats including DVD-Video, DVDData, DVD+R, DVD-R and DVD-RW.
>
> ...
>
> **● 16X DVD-ROM**
> Access your movies fast – 140ms average access time. Watch your favorite home movies that you create or your favorite movies. Supports DVD-R discs, Video discs and Photo CDs.
>
> ...

Applicant argues that its goods and the registrant's goods are not identical and are used for different purposes. That is, applicant's goods are a computer peripheral product used to store data on discs, a function which registrant's disc players and changers does not perform, because they are home entertainment products used only to play or reproduce data on discs. However, it appears from the material quoted above that one feature of applicant's product ("16X DVD-ROM") is that it may be used to "watch your favorite movies," presumably on the user's computer screen. To that extent, the goods appear to be

similar in that they can be used for the same purpose, i.e., watching movies on DVD.

Moreover, even if these goods are not identical in terms of function, we find that they are similar because they are compatible products. Applicant's product, according to its product specification sheet quoted above, can be used to "convert your old VCR tapes to a manageable number of DVD discs." It is apparent that the user would be able to use applicant's product to create or duplicate DVDs which then could and would be played using disc changers and players like registrant's.[6] It is likely that a purchaser with a collection of VCRs who intends to upgrade his or her home entertainment system would be in the market for both an optical drive like applicant's to convert VCRs to DVD, and for a DVD player like registrant's upon which to play the newly-created DVDs. Applicant's goods and registrant's goods thus are similar and related to that extent.

Finally, the record shows that purchasers are likely to expect that DVD drives like applicant's and disc players

[6] The websites of certain of applicant's competitors, made of record by the Trademark Examining Attorney, tout the compatibility of their drives with DVD players. These include registrant Sony itself, which states that its DVD Burners create discs which "play back in most DVD players," and LaCie, which states that its DVD Duplicators "are compatible with nearly all DVD players and DVD-ROM drives."

and changers like registrant's may originate from a single source under a single mark. The Trademark Examining Attorney has submitted at least eight third-party registrations which include both types of products in their identifications of goods.[7] Although such registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.,* 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc*., 6 USPQ2d 1467 (TTAB 1988). The record also includes a printout from registrant's website which shows that registrant itself, in addition to marketing the disc players and changers identified in the registration, also markets "DVD Burners" ("Burn your movie files to DVD") which appear to be similar to applicant's goods, albeit not under the registered MEGASTORAGE mark.

Based on this record, we find that applicant's goods and registrant's goods, as identified in the application

[7] See, e.g., Registration Nos. 2502344, 2632538, 2845234, 2629182, 2764923, 2787133, 2848397, and 2787333, attached to the Trademark Examining Attorney's final Office action.

and registration respectively, are similar and related under the second *du Pont* factor. This factor weighs in favor of a finding of likelihood of confusion.

We also find that applicant's and registrant's goods are marketed in the same trade channels and to the same classes of purchasers. Both products are sold at retailers like Circuit City, as is shown by the website evidence applicant itself has submitted. Applicant argues that the goods appear in different sections of the retailer's store and/or on different pages of the retailer's website ("computers" vs. "home entertainment products"), but we do not find this to be dispositive. It appears from the Circuit City website evidence applicant has submitted that the display of the two products is separated only by a few mouse clicks. In any event, as noted above, it is likely that a purchaser looking to upgrade his or her home entertainment system would be in the market for both products. We find that the third *du Pont* factor, i.e., the similarity or dissimilarity of trade channels, weighs in favor of a finding of likelihood of confusion.

We are not persuaded by applicant's contention that purchasers of these products necessarily are sophisticated, careful purchasers. Although applicant's goods and registrant's goods might not be impulse purchases, they

nonetheless are ordinary consumer items which would be purchased with ordinary care. The fourth *du Pont* factor therefore does not weigh significantly in applicant's favor, contrary to applicant's argument.

Applicant has submitted printouts of three third-party registrations of marks which include the designation MEGA covering Class 9 goods.[8] These registrations are not probative evidence of "use of similar marks on similar goods" under the sixth *du Pont* factor. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Nor does this evidence support applicant's argument that MEGA is a merely descriptive designation as applied to these goods. As discussed above, we find that MEGA is at best suggestive.

Weighing all of the evidence of record as it pertains to the *du Pont* likelihood of confusion factors, we conclude that a likelihood of confusion exists. The marks are similar, the goods are similar and related, and they are

[8] The other eight TESS printouts submitted by applicant are for pending or abandoned applications, which are of no probative value.

marketed in the same trade channels to the same classes of ordinary purchasers. These facts all weigh in favor of a finding of likelihood of confusion. To the extent that any doubts might exist, we resolve such doubts against applicant. *See In re Shell Oil Co.,* 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.,* 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc., supra*.

Decision: The refusal to register is affirmed.